

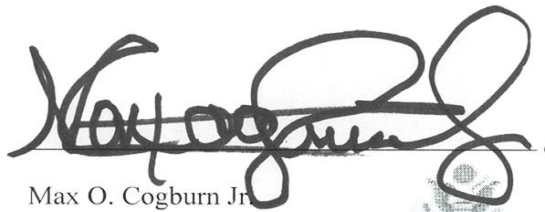
Second, the doctrine or affirmative defense of Last Clear Chance is equally non-susceptible to dismissal under Rule 12(b)(6). Clearly, plaintiff has pled this as an affirmative defense to defendant's assertion of contributory negligence. Thus, Rule 12(b)(6) does not operate to challenge plaintiff's responsive defense, which may be addressed at the conclusion of the presentation of plaintiff's case-in-chief if defendant carries its burden of showing contributory negligence, alleged as an affirmative defense rather than a counterclaim, during plaintiff's case-in-chief.

Finally, it is readily apparent that these two doctrines are pled in the alternative to plaintiff's principle claims that plaintiff's negligence was the sole and proximate cause of his injuries. Alternative and even inconsistent pleading is not only acceptable, it is envisioned and allowed by Rules 8(d)(2) and (d)(3) of the Federal Rules of Civil Procedure.

ORDER

IT IS, THEREFORE, ORDERED that defendant's Partial Motion to Dismiss Plaintiff's Amended Complaint (#14) is **DENIED**.

Signed: February 4, 2019



Max O. Cogburn Jr.
United States District Judge